

## NEWSLETTERS

# Preparing For And Responding To A Major Weather Event Or Catastrophe

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The recent flooding in Houston in the wake of Hurricane Harvey serves as a vivid reminder that losses caused by weather events and natural disasters are becoming all too familiar sights. According to numbers compiled by Munich Re, insured losses due to natural disasters in the United States in 2016 totaled \$23.8 billion, a nearly 48% increase over the \$16.1 billion total for 2015. The number of catastrophes (43) was the highest number of catastrophes in the 10 years from 2007 to 2016.

Results for 2017 remain uncertain based on Munich Re's reporting so far this year. After a first quarter with record losses, the total at the half-way mark of 2017 was significantly below historical levels. The Houston flooding has caused wide spread damage with loss estimates in the tens of billions, but it remains to be seen how many of those losses are insured.

Interestingly, the insured portion of total losses was up substantially in the first half of this year. This is because most losses were from thunderstorms and other insured events, rather than named storms and hurricanes (where the insurance industry has language in place to protect its exposures). U.S. severe thunderstorm events were responsible for three of the five costliest loss events around the globe in the first half of 2017, with each event causing economic losses of over \$2 billion. The total economic loss from these storms reached \$18.5 billion, of which \$13.5 billion was insured. That is good news for policyholders, but watch out for rate increases and tighter claim handling as insurers attempt to control their exposures.

Add America's aging infrastructure to these weather events and the potential for large-scale property damage and other losses becomes even greater. The American Society of Civil Engineers 2017 Infrastructure Report Card gives a grade of D+ to America's current infrastructure. This includes grades of D for dams and levees, which could be the greatest source of potential damage over the next several decades. More than 180,000 people were evacuated earlier this year when the Oroville Dam in Northern California threatened to break.

Also out West, the region has barely begun to see the impact of the record snows this past winter. The last time the Sierra Nevada snowpack reached levels like those seen this year, the resulting flooding caused nearly \$2 billion (in today's dollars) in damage. California agencies, businesses and residents have been working feverishly and spending millions of dollars to make sure that does not happen again. Much of the damage caused by the actual snow is just now being uncovered.

When a weather event and/or an infrastructure failure cause property damage, the results are usually devastating and there is very little time to plan a response. Advance planning is necessary. Policyholders must

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## RELATED PRACTICE AREAS

Insurance Recovery and Counseling

understand their insurance coverage, must decide who is responsible for what, and must build a process for responding to a loss.

## **Coverage Lays The Groundwork For Your Claim**

Purchasing the appropriate coverage is the first step in preparing for any loss. Policyholders, insurers and brokers need to evaluate what coverages may be necessary in the event of a major property loss, before that loss occurs. This analysis can be different for different types of businesses. While most policies will be based on standard insurance company language or broker forms, additional coverages or different types of coverage may be necessary depending on the business of the policyholder. Manufacturing companies experience different losses and require different coverages than developers or retailers, for example. It is more important than ever to make sure your coverage matches your potential exposures.

## **Responding To A Loss**

Many companies are not fully prepared to respond to a catastrophic loss. Your insurance company can help, and you should notify your insurance company promptly in the event of an insured event. Remember, though, that insurance companies make money by collecting premiums and avoiding or reducing claim payments, so your insurance company's interests are not necessarily aligned with your own in restoring your business. It is a good idea to shadow the insurance adjuster and insurance company's experts with your own personnel and/or experts, to make sure your interests are being served and to address, with the right personnel, any issues as they arise.

When everything is said and done, your insurance company will expect a full accounting of the costs and other insured losses caused by the event. That means having procedures in place to capture that information from the instant the loss happens and to track payments and losses through the full restoration of your business. Do not rely on your insurance company to do this for you. Often, your insurance company will hire an outside adjuster and/or consultants to evaluate the loss. These people do not work for you; they work for your insurance company. They may not even communicate directly with you. And, because your insurance company's interest is to keep costs down, their estimates of your loss often will not track your actual costs or losses, and their opinions on how the loss should be repaired or what property needs to be replaced may not align with the best interests of your business.

Your insurance policy may (and should) have coverage for "loss adjustment expenses" or "claim expenses." This coverage will pay the cost of certain third parties you can hire to help measure your loss; the terms differ from insurer to insurer and can be negotiated. This is important, because the offered language often contains restrictions that can substantially limit your ability to respond to a loss. You also need to make sure you have sufficient limits allocated to this coverage to respond to a major event, where these third parties will be most necessary.

Third-party loss adjusters are not lawyers and your conversations with them are not necessarily privileged (though they may be included in otherwise privileged communications without waiving privilege). It is, therefore, a good idea to consider retaining coverage counsel to ensure your claim tracks the coverage provided by your insurance policy. Policy

language is often unclear and the interpretation given to the language may differ from state to state. State laws also may affect what coverage is available and/or provide additional remedies or restrictions. Coverage counsel can help identify the legal issues likely to arise in interpreting the policy language and help address those issues as part of the claim.

## **Don't Assume Your Insurance Company's Position Is Correct**

At some point, you will receive a letter from your insurance company about your insurance coverage. The first letter will likely be what is called a "reservation of rights" letter, which often simply quotes policy language without taking any position on coverage. That letter may be followed by additional letters taking positions on coverage, or the insurance company may wait until your claim is submitted to tell you its coverage position. You should not ignore any of these letters and you should not assume your insurance company's position is correct.

The language and structure of insurance policies are often confusing. Much or all of the language may be standard language that has been interpreted by courts and commentators. Those interpretations may differ from state to state, and your state's position may differ from the position being taken by your insurance company. Which state law applies to your insurance policy may itself be a matter in dispute, and that issue alone may be dispositive of the outcome of your claim. All of these issues should be addressed with to ensure your claim receives the proper analysis and consideration.

In some cases, your insurance company's adjuster simply may not be familiar with an interpretation of policy language other than the one he or she is advancing for your claim. In other instances, the existence of alternative interpretations itself may be helpful to your claim. In most states, the fact that insurance policy language is ambiguous or has been interpreted differently in different jurisdictions is grounds for interpreting the language in favor of the insured and in favor of coverage.

## **Practical Tips**

- Every loss is different, but taking the following steps can help increase the odds of your claim being properly preserved, presented and, ultimately, paid:
- Own or at least be an active participant in the loss adjustment process
- Be alert to policy conditions, such as proofs of loss or suit limitations
- Establish a process for claim communications
- Consider putting a legal team together to conduct coverage analysis and handle issues that require legal involvement
- Keep records of important meetings, positions, and decisions
- Advise your personnel about the perils of shorthand or careless language when writing emails and taking meeting notes
- Consider matching your insurer's subject matter experts with your

own

- Document and photograph everything favorable to you – your insurer will be documenting everything favorable to it
- Educate loss adjusters and your experts on important aspects of your business that affect loss recovery
- Establish as many interim agreements and payments as you can. If you cannot force an agreement, force a timeline.
  - But be careful about making agreements that will limit your claim, particularly when there are still unknowns
- Develop and reinforce your themes and needs early and consistently
- Be alert to sudden changes – e.g., new adjusters, new experts, delays in decision-making, backtracking

*This article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*